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OCTOBER TERM, 1976

NO. 76-1426

JEAN E. SMITH,
Appellant - Petitioner

versus

LARRY CARTER,
Appellee - Respondent

RESPONDENT LARRY CARTER'S BRIEF IN OPPOSITION TO BRIEF OF PETITIONER, JEAN E. SMITH, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARMIS E. HAWKINS
P.O. Box 266
Houston, Mississippi 38851

Attorney for Appellee - Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTION PRESENTED

As on his appeal to the Court of Appeals, Petitioner obfuscates the simple question presented, It is *not*, as he claims:

> "Whether a United States citizen who is a permanent resident of Canada, and who is considered a 'subject' thereof by Canadian and Commonwealth law, may invoke the diversity jurisdiction of a Federal District Court under 28 U.S.C.#1332 (a) to maintain a civil action for fraud against a citizen of the State of Mississippi."

Instead, it is simply:

> "Whether a United States citizen who has no state citizenship, and who is living permanently in Canada, can claim diversity of citizenship under Section 1332(a) against a citizen of the State of Mississippi."

STATEMENT OF THE CASE

In his statement of the case, Petitioner states he is a "landed immigrant" of Canada, "a *necessary preliminary* for becoming a Canadian citizen." He fails to tell the Court that he has no intention of becoming a Canadian citizen, (App. 107):

DR. SMITH:

"Q You intended permanently to live in Canada?

"A I have a permanent appointment at the University of Toronto and that in my intention at the present time , yes.

"Q But you intend to keep your United States citizenship?

"A Yes, that is true."

Of course, it makes no difference what he intends to do, anyway, in reference to his future. He is in truth and in fact a United States citizen, but not a citizen of any State or territory of the United States, living permanently aboard.

He is not a hermaphrodite United States-Canadian citizen. He is just as much a United States citizen as the attorneys representing the parties, and the Justice ruling on his Petition.

Title 28, Section 1332 of the United States Code provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof;. . ."

The pertinent parts of Article III, Section 2 of the United States Constitution reads:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity. . .--to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

REASONS FOR DENYING WRIT

This very question was presented in *Van Der Schelling v. U. S. News and World Report* (1963) 213 F.Supp. 756, a case in which a California citizen sold all her property, moved to Mexico, but remained a United States citizen. She sued a Delaware corporation in a United States District Court in Pennsylvania, claiming she was a "subject" of Mexico. Her contention was rejected in an Opinion so lucid and well-reasoned we will not burden the Court with

quoting or paraphrasing. Plaintiff appealed, and the Court of Appeals stated:

> "The Judgment of the District Court will be affirmed for the reasons so well stated by Judge Joseph S. Lord III in his excellent Opinion. . ."

324 F(2d) 956, page 957.

Certiorari was denied by this Court. 377 U.S. 906, 12 L.Ed. 2d 177, 84 S. Ct. 1166.

The Court of Appeals followed this reasoning in this case, *Smith v Carter* (CA 5th) 545 F(2d) 909.

Petitioner's problem is with the word "subject", which has many different meanings, depending upon its usage, just as many other words in our langauge have many different meanings, depending upon their usage. For example, the word "run" can mean speed, a race, a tear in stockings.

By the alchemy of his admitted pedagogy Petitioner, a Professor of Political Science in a distinguished University, seeks to transform "subject to" into "subject of".

The authors of our Constitution were speaking of "subject" as a noun, and synonymous with "citizen". They were speaking of "subjects of" a sovereign in those days of monarchies, when most of the inhabitants of this earth were "subjects", not "citizens".

When a traveler is sojourning through some foreign state or country, or temporarily residing there, he is "subject to" the laws of that country. In this connection the word

"subject" is an adjective.

Of course Petitioner owes allegiance *to* the laws of Canada and of Great Britain while he lives within their territory and enjoys the benefits of their governments, and the protection of their statutes. He may have to purchase licenses for his automobile, pay some taxes. But he has never renounced his United States citizenship, applied for citizenship of Canada or of Great Britain, and he is not *now* a citizen of Canada, nor a *subject of* Canada or Her Majesty.

A mere traveler through Canada would owe allegiance to her laws and statutes and would have to abide by her rules and regulations as the price of the privilege of traveling there. And, the longer he stays, the more rules, regulations, laws and statutes, he may become *subject to*, and would owe allegiance to. But, there is a vast gulf between being *subject to* the laws of a land, and a *subject of* the soverign in that land.

The authorities cited by Petitioner will not sustain his position on the definition of *subject*. For example, *United States v. Wong Kim Ark* (1898), 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890, which involved the question of citizenship of a Chinese child born in this country of Chinese parents who were aliens living in the United States, beginning on page 892 of the U. S. Reports:

> ". . .Wom Kim Ark was born in 1873 in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and *subjects of the Emperor of China*; they were at the time of his birth domicil-

ed residents of the United States, *having previously established and still enjoying a permanent domicil* and residence in San Francisco. . ."

The Court goes on to say a lot of things in the opinion, bolstering Respondent's definition of the meaning of "subject", but 18 pages later the opinion concludes at page 910:

> "The evident intention, and the necessary effect, of the submission of this case to the decision of the Court. . .were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, *are subjects of the Emperor of China,* but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of the opinion that the question must be answered in the affirmative."

If Wom KIm's parents were not "subjects of" the United States how can it possibly be claimed Petitioner is a "subject of" Canada?

Again, Petitioner cites *Carlisle v. United States* (1872), 83 U.S. 426, a case involving British subjects living in the Confederacy during the War Between the States, and who manufactured and furnished salpeter to the Confederacy. The question was whether they could recover damages for

property seized, after general pardon by the President in 1868. The Court stated on page 429 of the Reports:

> ". . .it only remains to consider whether the Proclamation of December 25, 1868, embraces the claimants who were aliens domiciled in the country, within its provisions. And upon this point we entertain no doubt. The claimants were residents of the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, *not immediately relating to citizenship,* during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. 'The rights of sovereignty,' says Wildman, in his Institutes on International Law, p. 40, 'extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a *temporary* allegiance in return for that protection.
>
> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and a temporary

one. The *citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.*"

Petitioner has cited no legal authority, case or law journal, supportive of his contention. While Moore agrees to the anomaly of denying federal access to a United States citizen without State citizenship, he does not question the correctness of judicial construction, and suggests that any change should come from Congress. Moore's *Federal Practice*, Paragraph 0.74 (4), pp. 708.1 - 708.4., i.e., as Congress has decreed in subparagraph (d) of Section 1332.

Likewise, Currie, University of Chicago Law Review, Volume 36, page 10:

". . .If jurisdiction of such cases is to be sustained, it can only be the result of a statutory change supported as a grant of protective federal-question jurisdiction or of jurisdiction outside Article III; both these theories rely on Congressional authority over foreign affairs, and neither has been approved to date by the Supreme Court. Thus, expansion of jurisdiction to encompass all international cases falling within diversity policy would entail serious constitutional litigation at the outset. Moreover, it would import into the foreign-citizen cases the difficult test of domicile

or residence that complicates the present scheme of interestate diversity cases."

Page 11 of this Article contains the following caveat:

"Here, as always, it is easier to criticize than to construct a satisfactory alternative."

Likewise, Washington and Lee Law Review, Volume 19, entitled "Federal Diversity Suits by American Citizens Domiciled Abroad," concludes that any change should come from an amendment in the judicial code.

The cases supporting both the decision of *Van Der Schelling* and *Smith v Carter* (1977), 545 F(2d) 909, are set out in their opinions. In a long, unbroken sequence case after case has held with complete uniformity that diversity jurisdiction does not exist for a United States citizen, without state citizenship, living abroad suing a state citizen in a United States District Court.

Respectfully submitted,

PAUL M. MOORE, SR.
MOORE AND MOORE,
ATTORNEYS-AT-LAW,
CALHOUN CITY, MISSISSIPPI 38916

ARMIS E. HAWKINS,
ATTORNEY-AT-LAW,
P.O. BOX 266,
HOUSTON, MISSISSIPPI 38851

ARMIS E. HAWKINS,
OF COUNSEL FOR
RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Brief in Opposition to Brief of Petitioner, Jean E. Smith, in Support of Petition for Writ of Certiorari were served on Norman Sepenuk, 1330 Bank of California Tower, 707 Southwest Washington Street, Portland, Oregon 97205 and Fred M. Bush, Jr., 316 Court Street, Tupelo, Mississippi 38801, this 12th day of May, 1977.

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Armis E. Hawkins